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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1079

DOBBS HOUSES, INC.,
Petitioner,

v.

MRS. FANNIE M. SANDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

Dobbs Houses, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 28, 1970 (*infra*, p. A-13).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ... F. 2d ..., 2 FEP Cases 942 (*infra*, pp. A-4–A-11). The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, is reported at ... F. Supp. ..., 2 FEP Cases 940 (*infra*, pp. A-2–A-3).

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1970. A duly filed Petition for rehearing was denied on October 26, 1970. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," prohibits racial discrimination in private employment.

2. Whether, assuming that 42 U. S. C. § 1981 bars racial discrimination in private employment, it has been superseded in its specific application to that wrong by the later enactment of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5 (1970) a comprehensive congressional plan to end racial discrimination in employment based upon "race, color, religion, sex, or national origin."

STATUTES INVOLVED

1. 42 U. S. C. § 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253-66, 42 U. S. C. §§ 1971, 2000e-2000e-15), in relevant part, is set forth (*infra*, pp. A-14–A-36).

STATEMENT

I. FACTS

Respondent herein, Mrs. Fannie M. Sanders, was discharged by her employer Dobbs Houses, Inc., the Petitioner herein, for stealing food. On March 5, 1968, she formally complained to the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964,[1] that the charges against her had been false and that she was discharged solely because she was a Negro (p. A-1, *infra*). On May 12, 1969, the EEOC notified Mrs. Sanders that it had been unable to obtain voluntary conciliation and advised her that she had thirty days to commence a civil action pursuant to § 706 (e) of Title VII (p. A-1, *infra*). Forty-six days later, she instituted this action for an injunction, backpay and an offer of reinstatement under Title VII. Dobbs Houses moved the court to dismiss the complaint for failure to meet the thirty-day statute of limitations[2] (p. A-1, *infra*). Sanders thereupon moved the court for leave to amend her complaint to state jurisdiction under 42 U. S. C. § 1981. The trial judge allowed the amendment, subject to objection, but dismissed the amended complaint on the grounds that the statute of limitations barred the Title VII action and the § 1981 claim could not be maintained against a private employer in the absence of some element of State action (pp. A-2–A-3, *infra*).

II. THE DECISION OF THE DISTRICT COURT

The complaint was filed on June 27, 1969 alleging jurisdiction under 28 U. S. C., § 1343 and attempting to set forth a cause of action under 42 U. S. C., § 2000e, et seq.

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[1] 42 U. S. C. A., § 2000e-5 (1970) (pp. A-14–A-36, *infra*).

[2] 42 U. S. C. A., § 2000e-5 (*e*) (1970) (p. A-26, *infra*).

by alleging that the plaintiff, a Negro, was falsely accused of theft, threatened with criminal prosecution, and then fired, all in violation of the Equal Employment Opportunity Act. Upon the Defendant Dobbs Houses' motion to dismiss, the plaintiff, with leave of the court, subject to defendant's objections, amended her complaint to allege a cause of action arising under 42 U. S. C., §§ 1981, 1982 and 1983 with jurisdiction of the claim allegedly being present under § 1981. On the defendant's motion to dismiss the original complaint, the court ruled, contrary to the plaintiff's contentions, that the thirty-day statute of limitations contained in Title VII is mandatory and not directory and as the plaintiff had waited until forty-six days after the EEOC notified her conciliation efforts had failed before bringing suit she was banned from doing so by the statute of limitations (pp. A-26, *infra*).

As to the amended complaint, the court held that the damage claim the plaintiff attempted to set forth is clearly not authorized by § 1981 or by § 1982 and furthermore, in order to have a claim under § 1983, the discriminatory acts must have been done under color of State law. Since the plaintiff has alleged nothing to bring herself within the provision of any of these statutes, the court held it would be futile to allow the amendment. Accordingly, the Motion to dismiss was granted; the defendant's objections to the amendment of the complaint were sustained; and the order allowing amendment, subject to objection, was vacated.

III. THE DECISION OF THE COURT OF APPEALS

On appeal, the Court of Appeals reversed and remanded for trial. The court held that § 1981 prohibits private racial discrimination in employment relying on the Seventh Circuit's recent ruling in **Waters v. Wisconsin**

Steel Works, 427 F. 2d 476 (7th Cir. 1970) and stating that "[s]uch a conclusion was clearly forecast by the Supreme Court's opinion in **Jones v. Alfred Mayer Co.**, 392 U. S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968)" as § 1982 which was involved in the **Jones** case and § 1981 are both derived from § 1 of the Civil Rights Act of 1866.

The Court further held that § 1981 has not been pre-empted by Title VII again relying on **Waters**, *supra* and also relying on the ruling in **Jones**, *supra* that Title VII of the Civil Rights Act of 1968 did not repeal § 1982 by implication and the ruling in **Sullivan v. Little Hunting Park, Inc.**, 396 U. S. 229, 90 S. Ct. 400, ...: L. Ed. 2d ... (1970), that the Public Accommodations provisions of the Civil Rights Act of 1969 in no way impaired the sanction of § 1982. The court also noted that Congress rejected an amendment to Title VII that would have made it the exclusive federal remedy for employment discrimination.

Finally, the court held that an action for damages lies under § 1981.

REASONS FOR GRANTING THE WRIT

Because of the diversity of judicial opinion which has been precipitated by the questions herein presented, and because the area of civil rights and in particular, employment discrimination, has become so intense with litigation that an early final resolution to the questions presented herein is a must.

I

This action is based upon 42 U. S. C., § 1981, which in relevant part provides that "All persons within the jurisdiction of the United States shall have the same right in

every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .'"[3]

The question of whether this section prohibits racial discrimination in private employment has provoked a diversity of judicial opinion with some courts holding that it supports an action,[4] and others that it does not.[5]

In deciding the issue of whether or not § 1981 prohibits discrimination in private employment, one first meets the question of whether or not discrimination must be under color of State law in order to be prohibited by said section. In answering this question, petitioner thinks that it is appropriate to look first at the legislative history of the Civil Rights Act of 1866.

In the first session of the Thirty-ninth Congress on December 13, 1965, a few days prior to word being received

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[3] There is some question as to whether § 1981 is derived from § 1 of the Civil Rights Act of 1866 or § 16 of the Act of 1870 as § 1981 appears to have been taken almost verbatim from § 16 of the 1870 Act. The legislative history reveals that § 1981 is actually Section 1977 of the Revised Statutes of 1874, an official codification of all prior acts. The origin of R. S. 1977 is cited as the Act of 31 May, 1870.

[4] **Clark v. American Marine Corp.**, 304 F. Supp. 603, 609-611 (E. D. La. 1969); **Washington, State of v. Baugh Construction Co.**, 313 F. Supp. 598 (W. D. Wash. 1969); **Central Contractors Assoc. v. IBEW, Local 46**, 312 F. Supp. 1388 (W. D. Wash. 1969); **Dobbins v. Local 212, IBEW**, 292 F. Supp. 413 (S. D. Ohio 1969); **Waters v. Wisconsin Steel Works**, *supra*.

[5] **Harrison v. American Can Company**, . . . F. Supp. . . ., 2 FEP Cases 1 (S. D. Ala. 1969); **Colbert v. H. K. Corp., Inc.**, 295 F. Supp. 1091 (N. D. Ga. 1968); **Kendrick v. American Bakery Co.**, . . . F. Supp. . . ., 1 FEP Cases 349 (N. D. Ga. 1968); **Norman v. Missouri Pacific R. R.**, . . . F. Supp. . . ., 1 FEP Cases 331 (E. D. Ark. 1968), remanded without reaching this question, 414 F. 2d 73 (8th Cir. 1969); **Culpepper v. Reynolds Metals Company**, 296 F. Supp. 1232 (N. D. Ga. 1968); remanded without reaching this question, 421 F. 2d 888 (5th Cir. 1970); **Smith v. North American Rockwell Corporation**, . . . F. Supp. . . ., 2 FEP Cases 561 (N. D. Okla. 1970).

that the Thirteenth Amendment had been ratified, Senator Wilson introduced a bill which would have invalidated all laws in the former Rebel states which discriminated against persons as to Civil rights on the basis of color, in which would have made it a misdemeanor to an act or enforce such a statute.[6] On the same day, Senator Trumbull said with regard to Senator Wilson's proposal:

> "The bill does not go far enough, if what we have been told today in regard to the treatment of freedmen in the Southern States is true. . . . '[U]ntil [the Thirteenth Amendment] is adopted, there may be some question . . . as to the authority of Congress to pass such a bill as this, but after the adoption of the constitutional amendment, there can be none.'
> "The second clause of that amendment was inserted for some purpose, and I would like to know . . . for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free."[7]

Senator Trumbull then indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmens' Bureau and to secure the freedmen in their civil rights, both bills in his view being authorized by the second clause of the Thirteenth Amendment.[8]

On January 5, Senator Trumbull introduced both the freedmens' bill and the civil rights bill.[9] The civil rights bill was debated intermittently in the Senate on January 12, 1866 until its eventual passage over the President's veto on April 6. In the course of the debates, Senators

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[6] Cong. Globe, 39th Cong., 1st Sess., 39-42.

[7] Id. at 43.

[8] See ibid.

[9] Cong. Globe, 39th Cong., 1st Sess., 129.

Trumbull, who was by far the leading spokesman for the bill, made a number of statements which can only be taken to mean that the bill was aimed at "state action" alone.[10]

Among said statements is one made on January 29, 1866, in which Senator Trumbull cited a number of recently enacted Southern laws depriving men of rights named in the bill. He stated that "[t]he purpose of the bill under consideration is to destroy all these discriminations, and carry into effect the Constitutional Amendment."[11] On the same date, he further stated that "[This bill] may be assailed as drawing to the Federal Government powers that properly belong to "states"; but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any state where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the state of Kentucky, when her slave code and all her laws discriminating between persons on account of race or color shall be abolished."[12] And yet on another occasion, Senator Trumbull stated "[i]f an offense is committed against a colored person simply because he is colored, in a state where the law affords him the same protection as if he were white, this act neither has, nor was, intended to have anything to do with his case because he has adequate remedies in the state court; but if he is discriminated against under color of state law because he is colored, then it becomes necessary to interfere for his protection."[13]

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[10] **Jones v. Alfred H. Mayer Co.**, 392 U. S. 409, 456, 88 S. Ct. 2186, 2212, 20 L. Ed. 1189 (1968) (Mr. Justice Harlan's dissenting opinion).

[11] Cong. Globe, 39th Cong., 1st Sess. 474.

[12] Id., at 476.

[13] Id., at 1785.

The legislative history subsequent to the passage of the 1866 Act further supports the assertion that state action is required as that history identifies the Civil Rights Act of 1866 with the Fourteenth Amendment which requires state action, as it is known that one of the major reasons for the enactment of the Fourteenth Amendment was to insure the constitutionality of the 1866 Act.[14] Furthermore, subsequent to the passage of the Fourteenth Amendment, Congress reenacted the Civil Rights Act of 1866 in Section 18 of the Act of 1870. Since Congress does not usually reenact one of its own statutes, it is logical to assume that they did so in order to insure the constitutionality of the 1866 Act under the Fourteenth Amendment, thereby, even more identifying the Act of 1866 with state action.

Not only does the legislative history indicate that state action is necessary in order to have a cause of action under § 1981, the decisions of the United States Supreme Court also foster the same conclusion. In the **Civil Rights Cases**, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, decided less than two decades after the enactment of the Civil Rights Act of 1866, the court said in dictum of the 1866 Act:

> "This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified."

In the case of **Hurd v. Hodge**, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187, and **Corrigan v. Buckley**, 271 U. S. 323, 46

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[14] Biddle, **Civil Rights and the Federal Law, Safeguarding Civil Liberties Today**, 116, 117, 120-122 (1949); M. Konvitz, **A Century of Civil Rights**, 49-50 (1961); Kelly and Harbison, **The American Constitution**, third edition, 461, wherein the authors state concerning the working of the 14th Amendment, "These provisions, largely the work of Representative John A. Bingham of Ohio, were intended to remove all doubt as to the constitutionality of the Civil Rights Act, as Stevens presently makes clear in debate."

S. Ct. 521, 70 L. Ed. 969, the Supreme Court held in regard to the Civil Rights Act of 1866 that "the action towards which the provisions of the statute under consideration is [sic] directed is governmental action."

Even assuming that § 1981 was enacted to prevent private discrimination, it was clearly designed not to prohibit a white employer from refusing to hire a black or from discharging that black, but on the other hand to prevent the white employer from merely imposing another form of slavery on the black. Without the right to contract, the black would find it difficult to resist this other form of tutelage.[15]

Just as the history of a hundred years ago indicates that § 1981 was clearly not meant to prohibit private discrimination in employment, modern history, both of the Supreme Court and the Congress does likewise. For example, in **Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.**, 372 U. S. 714 (1963), the Supreme Court was confronted with the question of whether a Colorado statute prohibiting private discrimination in employment had been preempted by previous federal action in the same field, the court reviewed numerous statutes and the Executive Orders of Presidents of the United States, but nowhere did it consider or suggest that private discrimination in employment had comprehensively been rendered unlawful by provision of a statute passed in 1966. In fact, it did not even refer to the Civil Rights Act of 1866 in the decision. In another decision, **Steele v. Louisville & N. R. R.**, 323 U. S. 192 (1944), the Supreme

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[15] "It is, indeed, not probable that a general attempt will be made to restore slavery in its old form, on account of the barriers which such an attempt will find in its way; but there are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted." Report of Carl Schurz, S. Exec. Doc. No. 2, 39th Congress, 1st Sess. at 21 (1865).

Court went to great lengths to infer from the Railway Labor Act[16] an obligation upon unions to refrain from invidious discrimination on account of race and carry forth their obligation as exclusive bargaining representatives for employees. None of this would have been necessary had the court been able to rely upon § 1981. However, it did not rely upon said Section and petitioner contends that this was because said Section would have been of no avail to the court.

During the Congressional debates on Title VII of the Civil Rights Act of 1964, there was no hint that the Civil Rights Act of 1866 had already rendered private discrimination in employment unlawful and actionable in the federal courts. "For example, the leading proponents of Title VII submitted legal opinion from distinguished American constitutional lawyers, including the Deputy Attorney General, a wide range of private practitioners and law teachers, the Office of the Solicitor of Labor and the Bar Association of the City of New York . . . Not one of these authorities suggest that the apparently serious consideration given to the question of the constitutionality of the proposed Title VII was simply a charade in light of the fact the substitive prohibitions of that Title had been a part of the law of the United States since a year after the close of hostilities in the Civil War. . . ."

"One of the leading scholarly authorities on the subject of equal or fair employment and what is perhaps a leading treatise on the subject, states the following view as to the position of Title VII in the regulation of employment discrimination:

> 'Equal employment opportunity measures have taken many forms, including, most recently, a federal statute. Title VII of the Civil Rights Act of 1964 is the

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[16] 45 U. S. C., § 151 et seq.

first comprehensive equal employment opportunity law ever passed by Congress. . . .'

"Second, and as the product of the lengthy consideration and debate just described, the Congress enacted a statute which is in its own terms perspective in application . . . this further manifests the novelty of the legislation." **Smith v. North American Rockwell Corporation,** *supra.*

Petitioner contends that the recent case of **Jones v. Alfred H. Mayer,** *supra*, does not change the requirement of state action, as there is difference in the wording of § 1981 involved herein and § 1982 involved in the **Jones** case. Furthermore, three employment contract cases decided subsequent to **Jones** have decided that state action is still required under § 1981.[17]

II

Assuming *arguendo* that § 1981 applies to private discrimination in employment, one is then confronted with the question of what effect Title VII of the Civil Rights Act of 1964 has upon § 1981. Petitioner contends that Title VII has repealed by implication § 1981. Whereas, § 1981 is general in its terms, Title VII is explicitly specific. Under general principles of statutory interpretation, specific legislation "will prevail over general language of the same or another statute which might otherwise prove controlling."[18]

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[17] **Colbert v. H-K Corporation,** *supra*; **Kendrick v. American Bakery Co.,** *supra*; **Norman v. Missouri Pacific R. R.,** *supra.*

[18] **Kepner v. United States,** 195 U. S. 100 (1904); **Bulova Watch Co. v. United States,** 365 U. S. 753 (1961); **Fourco Glass Co. v. Transmirra Prods. Corp.,** 353 U. S. 222 (1957); **Virginian Rwy. v. System Federation,** 300 U. S. 515 (1937); **Gallishan v. United States,** 285 U. S. 515 (1932); **Ginsberg & Sons, Inc. v. Popkin,** 285 U. S. 204 (1932).

Where the provisions in two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.[19] Thus, one must examine § 1981 and Title VII extensively and determine whether or not there is irreconcilable conflict. Whereas § 1981 is very general and broad, Title VII is an extensive and comprehensive attempt to deal with the problem of equal employment opportunity. Title VII applies not only to employers, but also to employment agencies, labor unions, and joint labor-management committees which control apprenticeship or other training programs. It is aimed at employment discrimination based not only upon race or color but also on religion, sex, or national origin. § 703, 42 U. S. C., § 2000e-2. The act creates the Equal Employment Opportunity Commission and directs it to receive, investigate and conciliate charges of discrimination in employment. §§ 705, 706 (a), 42 U. S. C., §§ 2000e-4, 2000e-5 (a). Where the alleged discrimination occurs in a state or city which has its own equal employment law, the EEOC normally may not take jurisdiction over a complaint until the state or local agency has had an opportunity to act. § 706 (b), (c), 42 U. S. C., § 2000e-5 (b), (c). If the EEOC is unable to secure voluntary compliance, it must notify the complainant, who may then file suit within thirty days in a federal district court. § 706 (e), 42 U. S. C., § 2000e-5 (e).

"[Thus], the statute provides administrative investigation, conciliation and enforcement, as well as litigation in the United States District Court, in an elaborate structure of procedures which evidences a statutory purpose favoring administrative investigation and conciliation—not merely litigation. This statutory purpose and the complicated combination of administrative action and litigation have both received wide spread judicial recog-

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[19] **Posadas v. National City Bank**, 296 U. S. 497, 503 (1936).

nition and approval . . . construction of 42 U. S. C., § 1981 as a jurisdictional basis for judicial decision in this complicated area of employment practices would be an insupportable avoidance of the evident purpose and meaning of Title VII of the Civil Rights Act of 1964 and particularly of the elaborate administrative and litigative machinery provided thereunder." **Smith v. North American Rockwell Corporation,** *supra.*

Where Title VII is specific, § 1981 is general in its terms and applicability. Where Title VII sets forth a twentieth century structure of administrative machinery and procedures with administrative investigation and conciliation being favored over court litigation, § 1981 provides direct access to the courts. Where Title VII has a thirty day statute of limitations, § 1981 has the longer state statute of limitations. Where Title VII has exclusions and exemptions, §1981 has none. From even a cursory examination of the two statutes, one is confronted with many conflicts both in the policy area and the procedural area of the two statutes. From a purely legal standpoint, Petitioner submits that Title VII has by implication, repealed § 1981. However, Petitioner contends that § 1981 should be laid to rest also, from a purely practical standpoint. As stated by Chief Judge Barrow in **Smith v. North American Rockwell Corporation,** *supra,* ". . . unless the 1866 statute is eliminated from this case, litigation thereunder would require this court to formulate an applicable period of limitations for causes of action, appropriate rules governing the scope of remedies, and standards of relevance for discovering proceedings and for defining the issues to be litigated. No guides to any such proposed judicial tasks have been developed in the more than 100 years of the existence of 42 U. S. C., § 1981 in its current and predecessor forms."

To do as the United States Court of Appeals for the Fifth Circuit has done in the instant case, is to say that

the extensive and commendable work Congress did in passing Title VII was in large part a complete waste of time. It is to say that the effort to provide a practical method by which discrimination in employment can be rectified through an administrative agency which can rely on its expertise in the area and proceed through the conciliation method as opposed to court litigation, has been nullified. Surely, this is not the Congressional intent. The final problem this court is to resolve is whether, assuming that Title VII has not repealed § 1981, what effect has it had upon that statute. Is it as the United States Court of Appeals for the Fifth Circuit has said—that the two statutes must remain viable, side by side, with the alleged discriminatee having a choice as to which remedy he wishes to pursue? Thus, allowing him to either choose Title VII or on the other hand, § 1981 or as Mrs. Sanders did in the instant case, follow the Title VII route and then switch over to the § 1981 route? Or is it to be as the United States Court of Appeals for the Seventh Circuit has held —that one cannot be allowed to intentionally bypass the Equal Employment Opportunity Commission without good reason. **Waters v. Wisconsin Steel Works**, *supra*. At the very least, this court should require as did the Seventh Circuit, that an aggrieved person be required to follow Title VII unless they have good reason for not doing such. In the instant case, the Plaintiff followed Title VII up until the time she realized that her suit in Federal District Court could not lie under that act because of the thirty-day statute of limitations. At that point, she changed over to § 1981 undoubtedly assuming that a different statute of limitations would apply. She has shown no good reason why she could not have filed suit within the thirty-day statute of limitations under Title VII and, therefore, under the **Waters** case, would not be able to maintain her action.

It is because of the questions of whether § 1981 prohibits private discrimination in employment and, if so,

what effect Title VII has had upon that section as well as the questions of what impact the **Jones,** *supra* decision of this court has had upon this area, plus the diversity of judicial opinion precipitated by these questions and the the differences in the opinions of the Fifth and Seventh Circuits that this court should grant this petition for certiorari and lay to rest these questions once and for all.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted

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